

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>JOSEPH HARDESTY,</b>	:	Case No. 1:16-CV-00367
	:	
Plaintiff,	:	Judge Timothy Black
	:	
v.	:	
	:	<b>MOTION FOR EXTENSION OF TIME</b>
<b>THE KROGER CO., et al.</b>	:	<b>TO FILE APPEAL PURSUANT TO</b>
	:	<b>FED. R. APP. P. 4(a)(5)</b>
Defendants.	:	

Now comes Plaintiff Joseph Hardesty (“Plaintiff”), and pursuant to Fed. R. App. P. 4(a)(5) hereby moves this Court to extend the time period under which to file an appeal of the Court’s Order Granting Defendant’s Motion for Summary Judgment by three days. Plaintiff filed a notice of appeal with the District Clerk on Friday, April 20, 2018, which was within 30 days of entry of the judgment or order appealed from. (*See* Notice of Appeal, Doc#69). Following this filing, on Monday, April 23, 2018, Plaintiff’s counsel was contacted by the District Clerk and informed that the document was filed using the incorrect event, and directed by the District Clerk to re-file the document using the correct event. Confirmation of this issue was sent via e-mail to Plaintiff’s counsel, a copy of which is attached hereto as **Exhibit 1**. Plaintiff immediately re-filed the same notice of appeal document under the correct event (*See* Doc#70), however this filing occurred on April 23, 2018, just after the 30-day time period for appeal had run.

It is Plaintiffs’ position that the original filing on April 20, 2018 is an effective filing of the notice of appeal, upon which the re-filing on April 23, 2018 would relate back. However, out of an abundance of caution, and to avoid any timeliness or jurisdiction issues with respect to Plaintiffs’ appeal, Plaintiff respectfully requests that this Court grant an extension of time of three days, thus placing Plaintiffs’ re-filed Notice of Appeal within the applicable time period for appeal

in the event that the document does not relate back to Plaintiff's original filing. A memorandum in support is attached.

Respectfully submitted,

/s/ Joshua M. Smith

Peter A. Saba (0055535)

Joshua M. Smith (0092360)

Sharon J. Sobers (0030428)

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**Attorneys for Plaintiffs**

### **MEMORANDUM IN SUPPORT**

“In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.” Fed. R. App. P. 4(a)(1)(A). However, “[T]he district court may extend the time to file a notice of appeal if: (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether the motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.” Fed. R. App. P. 4(a)(5).

In this case, Plaintiff complied with Fed. R. App. P 4(a) with respect to his timely filing of a notice of appeal with the District Clerk. Plaintiff filed his notice of appeal on April 20, 2018, which is within 30 days of the date in which the Court entered the Order Granting Summary Judgment. The only issue with the filing was that the “incorrect event” was inadvertently placed

on the filed document, and therefore at the District Clerk's direction Plaintiff re-filed the notice of appeal.

Plaintiff re-iterates his position that the original filing of the notice of appeal on April 20, 2018 (Doc#69) was not invalidated by his re-filing of the document under the correct event on April 23, 2018 (Doc#70). However, out of an abundance of caution, Plaintiff respectfully requests that this Court extend the time period in which Plaintiff may file his notice of appeal to April 23, 2018, the date in which the corrected notice was subsequently filed. As this is an extremely short extension of time (3 days) there is no known prejudice which will occur to Defendants-Appellees.

For the foregoing reasons, Plaintiff respectfully requests that this Court grant him an additional three (3) days in which to file his notice of appeal, pursuant to Fed. R. App. P. 4(a)(5).

Respectfully submitted,

/s/ Joshua M. Smith  
Peter A. Saba (0055535)  
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing was served electronically through the District Court's electronic case filing system upon David K. Montgomery, Esq., and Ryan Martin, Esq., Jackson Lewis P.C., PNC Center, 26<sup>th</sup> Floor, 201 East Fifth Street, Cincinnati, Ohio 45202, this 23rd day of April, 2018.

/s/ Joshua M. Smith  
Joshua M. Smith (0092360)

**Courtney M. Wright**

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**From:** cmecfhelpdesk@ohsd.uscourts.gov  
**Sent:** Monday, April 23, 2018 11:31 AM  
**To:** ecf.notification@ohsd.uscourts.gov  
**Subject:** Activity in Case 1:16-cv-00367-TSB Hardesty v. Kroger Co. et al Notice of Corrective Docket Entry

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

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**U.S. District Court**

**Southern District of Ohio**

**Notice of Electronic Filing**

The following transaction was entered on 4/23/2018 at 11:31 AM EDT and filed on 4/23/2018

**Case Name:** Hardesty v. Kroger Co. et al

**Case Number:** 1:16-cv-00367-TSB

**Filer:**

**WARNING: CASE CLOSED on 03/21/2018**

**Document Number:** No document attached

**Docket Text:**

**Notice of Correction re:[69] Notice (Other), document was filed using the incorrect event, the filer was contacted and will re-file the document using the correct event. (bjc)**

**1:16-cv-00367-TSB Notice has been electronically mailed to:**

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